must suffer considerable mental anguish and suspense from the time of his arrest until the final determination of the case against him.

As to damages, for out-of-pocket expenses incurred in obtaining legal assistance for the 11-day trial, the plaintiff had paid Dato Rajasooria $2,000 and remains liable to pay him $2,200 by way of refreshers. I would assess the general damages at $10,000. I accordingly give judgment for the plaintiff for $14,200 and costs to be taxed.

Judgment for the plaintiff.

Solicitors: *Richard Talalla & Co.*

MALAYAN CREDIT LTD. v. MOHAMED KASSIM

[O.C.J. (Hepworth J.) March 12, 1965]

[Penang — Civil Suit No. 44 of 1964]

Hire purchase — Hire purchase agreement — Whether bill of sale — Whether moneylending transaction — Claim for damages — Whether sum claimed penalty or liquidated.

Contract — "Contract of sale" and "sale" — Distinction between — Default.

The defendant arranged to purchase a motor car from Universal Cars Ltd. It was agreed that the motor car should be sold by Universal Cars Ltd. to the plaintiffs, a hire purchase finance company, on the understanding that they would enter into a hire purchase agreement with the defendant. This was done but before the first instalment was due the motor car met with an accident as a result of which the car was badly damaged and the defendant seriously injured. As a result the defendant failed to pay the instalments and the plaintiffs brought an action claiming $4,250 being the amount due on the said motor car under the hire purchase agreement or the return of the said motor car. It was argued on behalf of the defendant that the agreement was a bill of sale and the transaction was a moneylending transaction or alternatively if it was a *bona fide* hire purchase agreement then the sum claimed was a penalty and therefore unforceable.

Held: (1) although there was an agreement between Universal Cars Ltd. and the defendant for the sale of the car, the property in the car had not passed to the defendant, instead the defendant had agreed that the car be sold to the plaintiffs on the understanding that the plaintiffs would enter into a hire purchase agreement with the defendant. In these circumstances the agreement was not a bill of sale;

(2) on the authority of *Transport and General Credit Corporation Ltd.* v. *Morgan* [1] the transaction in the present case was not a moneylending transaction;

(3) as the contract did not stipulate that a named sum shall become payable on breach, the sum claimed was not a penalty.

Case referred to:—

(1) *Transport & General Credit Corporation Ltd.* v. *Morgan* [1939] 1 Ch. 531.

CIVIL SUIT.

Lee Saik Kee for the plaintiffs.

Lee Cheng Keat for the defendant.

Cur. Adv. Vult.

Hepworth J.: The plaintiffs are a hire purchase finance company carrying on business at 9, Union Street, Penang. The defendant at all material times was the secretary of the Malayan Police Co-operative Society, Penang.

On the 28th August, 1963, the defendant entered into a hire purchase agreement with the plaintiffs (hereinafter referred to as the agreement) whereby the defendant agreed to hire a Ford Cortina motor-car PD 5436 from the plaintiffs and pay therefor 29 instalments of $141.35 commencing on the 28th September, 1963 and one final instalment of $150.85. After payment of all the instalments due the defendant was to be entitled to purchase the said motor-car for the sum of $10.

The defendant took delivery of the said motor-car on the 28th August, 1963, and while driving the said motor-car on the 26th September, 1963, met with a serious accident as a result of which the said motor-car was badly damaged and the defendant suffered severe injuries. As a result no instalments have ever been paid under the agreement.

The said motor-car was ultimately repaired at a cost of $2,100, which sum was paid by the plaintiffs, and is now in a garage in Penang.

The plaintiffs claim $4,250 being the amount due on the said motor-car under the agreement or the return of the said motor-car.

The defendant pleads that:—

(a) the agreement is a bill of sale within the meaning of the Bills of Sale Ordinance, 1950, and that as it has not been drawn up, executed or registered in accordance with the provisions of that Ordinance it is void and unenforceable, and

(b) the transaction was a moneylending transaction that the plaintiffs are not licensed moneylenders, and that the transaction is void for non-compliance with the provisions of the Moneylenders Ordinance, 1951, and therefore unenforceable, or alternatively

(c) if the transaction between himself and the plaintiffs is a *bona fide* hire purchase transaction, then the sum claimed is a penalty and therefore unrecoverable.

The defendant counterclaims for a declaration (1) that at all material times he was the sole owner of the said motor-car and still is, and (2) that the agreement is a bill of sale within the meaning of the Bills of Sale Ordinance, 1950.

Briefly the defendant's ground for pleas (a) and (b) is that he purchased the said motor-car from Messrs. Universal Cars Ltd., Penang, on the 27th August, 1963, and that the said motor-car was not, as the plaintiffs allege, sold by Messrs. Universal Cars Ltd., to the plaintiffs on the 28th August, 1963.

I do not propose to go into the facts in detail but to state my view of the facts as disclosed in the evidence. On the 27th August, 1963, the defendant went to Universal Cars Ltd., with one

of that company's salesman Mr. Koh Poh Beng, and after discussions with that company's sales manager, P.W.2., Universal Cars Ltd. agreed to sell the said motor-car to the defendant. On that date a booking deposit of $100 was paid by the defendant to Universal Cars Ltd. and the company agreed to take in part exchange a Triumph Herald convertible at a value of $3,000. It was in my opinion as I have said an agreement for sale and it was clear from what happened that the intention was that the property in the said motor-car was not to pass until satisfactory arrangements had been made for the payment of the balance of the purchase price.

The term "contract of sale" includes both actual sales and agreements for sale. It is important to distinguish clearly between the two classes of contract. An agreement to sell, or, as it is often called, an executory contract of sale, is a contract pure and simple; whereas a sale, or, as it is called for distinction, an executed contract of sale is a contract plus a conveyance. By an agreement to sell a *jus in personam* is created, by a sale a *jus in rem* also is transferred. Where goods have been sold, and the buyer makes default, the seller may sue for the contract price, but where an agreement to buy is broken, the seller's normal remedy is an action for unliquidated damages. If an agreement to sell be broken by the seller, the buyer has only a personal remedy against the seller. The goods are still the property of the seller, and he can dispose of them as he likes. But if there has been a sale, and the seller breaks his engagement to deliver the goods, the buyer has not only a personal remedy against the seller, but also the usual proprietory remedies in respect of the goods themselves. Again, if there be an agreement for sale, and the goods are destroyed, the loss as a rule falls on the seller, while if there has been a sale, the loss as a rule falls on the buyer, though the goods have never come into his possession. (*Chalmers'* Sale of Goods, 13th Edition page 11).

On the 28th August, 1963, the defendant was introduced to the plaintiffs by Universal Cars Ltd.'s salesman, Mr. Koh Poh Beng. The plaintiffs' representative, PW..1, stated that the arrangement that was made was that the plaintiffs would buy the said motor-car from Universal Cars Ltd., and hire it to the defendant under a hire purchase agreement. Various documents were prepared for this purpose, including the agreement, and were signed by the defendant, and it is clear he was a party to and agreed to this arrangement.

In other words, although there was an agreement between Universal Cars Ltd. and himself for the sale of the said motor-car to him, the property in the said motor-car had not then passed to him, and he agreed that instead of the completion of the sale to him the said motor-car should be sold to the plaintiffs on the understanding that they would enter into a hire purchase agreement with him.

In these circumstances the agreement is not a bill of sale.

In the case of *Transport and General Credit Corporation Limited* v. *Morgan* [1] it was agreed between company A and company B that, whenever a customer proposed to obtain any goods from company A on the hire purchase system, company A would immediately sell the goods to company B and company B would let them to the customer with an option of purchase on payment by instalments. In his judgment, Simonds J. commenting on this arrangement said:—

> "It has often been said that it is in any case a question of fact whether a transaction is one of moneylending. It appears to me that it would be contrary to the ordinary use of language to describe this as a moneylending transaction, or to regard the financier (if I may so call him) who undertakes this business as carrying on the business of moneylending.
>
> It must be remembered that hire-purchase agreements now take a very large part in the commercial and social life of the community, and the financing of them is an enormous business in the City of London and elsewhere. It appears to me that the financiers and the dealers co-operate in the common venture of making the whole business of hire-purchase agreement, which is now, for good or for evil, a necessary part of our social life, feasible, and to regard one party to that common venture, which is now a recognized mercantile service, as carrying on the business of a moneylender is an abuse of language."

For the same reasons the transaction in the present case is not in my opinion a moneylending transaction.

It is a well-established principle of contract law that where a contract stipulates that a named sum shall become payable by a party upon his committing a breach of the contract that stipulation will only be enforced if the sum in question is a genuine pre-estimate of liquidated damages and is not a penalty fixed *in terrorem* of the offending party. But in the present case the contract does not stipulate that a named sum shall become payable on a breach. The plaintiffs are only claiming the sum which the defendant agreed to pay under the agreement or the return of the said motor-car.

There will therefore be judgment for the plaintiffs and the defendant's counterclaim is dismissed.

Judgment for the plaintiff; counterclaim dismissed.

Solicitors: *Lim Huck Aik & Co.; Lee Cheng Keat.*